A

DP Vijandran v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO A-09-65 OF 1996
GOPAL SRI RAM, SITI NORMA YAAKOB AND HAIDAR JJCA
24 AUGUST 1998

B

Criminal Procedure *— Appeal — Fact, finding of — Appellate court generally will not interfere with findings of facts — Unless events affirmed by trial judge could not have occurred or failure to critically assess and analyse prosecution's evidence — Whether this court may interfere with findings of fact in present case*

C ***Criminal Procedure*** *— Trial — Impeachment — Appellant's solicitor gave evidence — Contradictions between his evidence in court and previous statement — Impeachment procedure only used where apparent discrepancy material — Whether impeachment proceedings ought to have been permitted by sessions judge*

The appellant was convicted by the sessions court of an offence under s 193 of the Penal Code (FMS Cap 45) and sentenced to a term of D imprisonment of one month and a fine of RM2,000 or in default a term of imprisonment of two weeks. The prosecution's case against the appellant was that he fabricated false evidence, the sting of the charge being that he affirmed an affidavit that contained false statements which was filed in a suit he instituted in the High Court. E In the affidavit, the appellant had stated that he had 'been made out to as a person who has acted in pornographic tapes'. The prosecution had produced in evidence a video tape ('exh P12') which depicted the appellant committing acts of sexual intercourse with a female partner. Evidence, including that of an expert, was led by the prosecution to show that the images of the male appearing in exh P12 were indeed F that of the appellant. The sessions court found as a fact that the male actor in exh P12 was the appellant, and this finding was affirmed by the High Court.

In the sessions court, the appellant was called upon to make his defence and he called his solicitor to give evidence on his behalf. G During the course of his evidence under cross-examination, the prosecution successfully applied to impeach the credit of this witness by reference to alleged contradictions between his evidence in court and the previous statement he had made to the police in the course of their investigations. The appellant's appeal to the High Court against conviction and sentence was dismissed and he appealed to this court.

H

Held, allowing the appeal:

(1) The prosecution had established beyond a reasonable doubt that the male actor appearing in exh P12 was indeed the appellant. However, the prosecution had failed to establish that exh P12 was I the very tape which the appellant referred to in his affidavit, or that the only tape in existence was exh P12, so that the appellant could not possibly be referring to any other tape. It is an equally reasonable inference that the appellant was referring to some

video tape other than exh P12, and this inference was supported by evidence adduced in the course of the prosecution's case. In a criminal case where two inferences may reasonably be drawn from the same set of facts, the inference most favourable to the accused should be adopted. The charges against the appellant were not proved and the defence should not have been called (see pp 413I and 414A–B, G).

(2) Sessions judges and magistrates should always bear in mind that the impeachment procedure is cumbersome and slow and should not be used unless the apparent discrepancy is material to the issue. The sessions court in the present case was wrong in holding that the solicitor was a witness without credit especially in the light of the recording officer's admission of a possibility of confusion on that portion of the previous statement contended by the prosecution to amount to a material contradiction. The impeachment proceedings ought not to have been permitted in the circumstances of the present case (see pp 414I and 415A–B).

Obiter:

It is the settled practice of this court not to interfere with concurrent findings of fact save in very rare cases, such as when it could be shown that the course of events affirmed by the trial judge could not have occurred. Appellate interference may also be warranted where the trial judge had failed to critically assess and analyse the prosecution's evidence. However, the present instance was not one which fell into any of the recognized categories of cases where this court may interfere with concurrent findings of fact (see p 413D–F).

[Bahasa Malaysia summary

Perayu telah disabitkan oleh mahkamah sesyen atas satu kesalahan di bawah s 193 Kanun Keseksaan (NMB Bab 45) dan dijatuhkan hukuman penjara selama sebulan dan denda sebanyak RM2,000 atau jika ingkar hukuman penjara selama dua minggu. Kes pihak pendakwa terhadap perayu adalah bahawa beliau telah mengemukakan keterangan palsu, yang mana asas pertuduhan ialah bahawa beliau telah mengikrarkan afidavit yang mengandungi pernyataan palsu yang difailkan dalam satu guaman yang dimulakan di Mahkamah Tinggi. Dalam afidavit, perayu telah menyatakan bahawa dia telah 'digambarkan sebagai seorang yang telah berlakon dalam pita-pita lucah'. Pihak pendakwa telah mengemukakan dalam keterangan suatu pita video ('eks P12') yang menunjuk perayu melakukan hubungan seks dengan seorang wanita. Keterangan, termasuk keterangan saksi pakar, telah dikemukakan oleh pihak pendakwa bagi menunjukkan bahawa imej-imej lelaki yang muncul dalam eks P12 memanglah imej perayu. Mahkamah sesyen mendapati sebagai satu fakta bahawa pelakon lelaki dalam eks P12 adalah perayu, dan keputusan ini telah disahkan oleh Mahkamah Tinggi.

A Di mahkamah sesyen, perayu telah dipanggil untuk memasukkan pembelaan dan beliau telah memanggil peguamcaranya untuk memberi keterangan bagi pihaknya. Semasa memberi keterangan di bawah pemeriksaan balas, pihak pendakwa berjaya dalam permohonan untuk mencabar kredit saksi ini dengan merujuk kepada percanggahan di antara keterangannya di mahkamah dan pernyataan B dahulu yang telah dibuatnya kepada pihak polis semasa siasatan mereka. Rayuan perayu kepada Mahkmah Tinggi terhadap sabitan dan hukuman telah ditolak dan beliau merayu kepada mahkamah ini.

Diputuskan, membenarkan rayuan:

C (1) Pihak pendakwaan telah membuktikan melampaui keraguan munasabah bahawa pelakon lelaki yang muncul dalam eks P12 memanglah perayu. Namun demikian, pihak pendakwaan telah gagal membuktikan bahawa eks P12 adalah pita yang dirujuk oleh perayu dalam afidavitnya, atau bahawa satu-satunya pita yang wujud adalah eks P12, dan dengan itu perayu tidak mungkin D merujuk kepada mana-mana pita lain. Adalah juga inferens yang sama-sama munasabah bahawa perayu merujuk kepada pita video lain selain daripada eks P12, dan inferens ini disokong oleh keterangan yang dikemukakan semasa perjalanan kes pihak pendakwa. Dalam kes jenayah di man dua inferens boleh dibuat secara munsabah daripada set fakta yang sama, inferens yang E paling memihak kepada perayu haruslah diterimapakai. Pertuduhan-pertuduhan terhadap perayu tidak terbukti dan pembelaan tidak harus dipanggil (lihat ms 413I dan 414A–B, G).

(2) Hakim-hakim sesyen dan majistret haruslah sentiasa mengingati bahawa prosedur pencabaran adalah tidak cekap dan lembap dan F tidak harus digunakan melainkan perselisihan yang nyata adalah material kepada isu berkenaan. Mahkamah sesyen dalam kes ini adalah salah dalam memutuskan bahawa peguamcara adalah seorang saksi tanpa kredit terutamanya memandangkan pengakuan pegawai perakam tentang kemungkinan kekeliruan atas bahagian pernyataan terdahulu yang dihujahkan oleh pihak G pendakwa merupakan penyangkalan material. Prosiding pencabaran tidak sepatutnya dibenarkan dalam keadaan-keadaan kes ini (lihat ms 414I dan 415A–B).

H **Obiter**:

Adalah amalan mantap mahkamah ini untuk tidak mengganggu keputusan fakta bersama kecuali dalam kes-kes yang jarang, umpamanya apabila ia boleh ditunjukkan bahawa perjalanan peristiwa yang didapati oleh hakim perbicaraan tidak mungkin telah berlaku. Gangguan rayuan juga mungkin diwajarkan di mana hakim I perbicaraan telah gagal menilai dan menganalisa keterangan pihak pendakwa secara kritikal. Walau bagaimanapun, keadaan di sini bukanlah satu yang termasuk dalam mana-mana kategori kes yang

diiktirafkan di mana mahkamah ini boleh mengganggu keputusan fakta bersama (lihat ms 413D–F).] A

Notes

For cases on appeal against finding of fact, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 210–255. B

For a case on impeachment, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2972.

Cases referred to C

Eurymedon, The (1942) 73 Lloyd LR 217 (refd)
Muthusamy v PP [1948] MLJ 57 (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19 (refd)
Tai Chai Keh v PP [1948–49] MLJ Supp 105 (refd)
Tara Singh & Ors v PP [1949] MLJ 88 (refd) D
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 193, 199
Penal Code [India] E

Appeal from: Criminal Appeal No 52–15 of 1994 (High Court, Ipoh)

Court of Appeal:
Muhammad Shafee Abdullah (Shafee & Co) for the appellant.
Shamsul Sulaiman (Deputy Public Prosecutor) for the respondent. F

High Court:
Muhammad Shafee Abdullah (Shafee & Co) (*Thevintharan* (*Thevin Chandran & Wong*) with him) for the appellant.
Shamsul Sulaiman (Deputy Public Prosecutor) for the respondent. G

High Court

19 December 1996

Ahmad Fairuz JCA: H

Latar belakang rayuan

Di mahkamah sesyen, En DP Vijandran ('perayu') dituduh melakukan kesalahan 'mereka keterangan palsu untuk digunakan di dalam prosiding kehakiman' (ms 30 rekod rayuan) — suatu kesalahan di bawah s 193 Kanun Keseksaan (NMB Bab 45). Secara alternatif, perayu dituduh membuat kenyataan palsu di dalam suatu afidavit yang difailkan di Mahkamah Tinggi I

A Malaya di Ipoh dan perayu tahu atau percaya bahawa kenyataan itu adalah palsu atau tidak percaya yang kenyataan itu adalah benar — suatu kesalahan di bawah s 199 Kanun Keseksaan. Terseretnya perayu kepada tuduhan-tuduhan itu berakarumbi dari suatu tindakan sivil olehnya terhadap seorang bernama S Ravindran ('defendan'). Tindakan sivil itu adalah di Mahkamah Tinggi Ipoh. Defendan, mengikut pernyataan tuntutan perayu, dikatakan
B tinggal dengan perayu 'pada suatu tempoh masa'. Semasa itu, defendan 'telah menggunakan kamera video yang telah disembunyikan secara sulit dan menggambarkan' perayu 'dalam keadaan memalukan tanpa pengetahuan' perayu 'dan telah menyambat dan tersusun di atas satu sama lain dalam imej video daripada pita-pita lucah yang lain yang mengandungi
C imej-imej video lucah untuk membuat video pita composit yang lucah'. Penyata tuntutan itu meneruskan dengan mengatakan bahawa 'defendan telah mengakibatkan dan/atau membenarkan pita yang dibuat begitu ... untuk diedarkan kepada/atau oleh pihak ketiga dan melalui cara itu menerbitkannya ... . Melalui penerbitan tersebut, perayu 'telah dikatakan sebagai seorang pelakun dalam pita-pita lucah' (ms 32 rekod rayuan). Ini
D semua, tegas perayu dalam penyata tuntutannya itu, 'mengakibatkan kecederaan yang teruk kepada kehormatan dan nama baik' perayu 'dan dengan ini telah membawa' perayu 'kepada skandal, kebencian dan penghinaan'. Kerana ini semua, perayu menuntut, antara lainnya, 'kerugian untuk memfitnah' dan 'satu injunksi untuk menghalang defendan ... dari penerbitan lanjut atau mengakibatkan penerbitan dan/atau mengedarkan
E pita-pita tersebut yang memfitnahkan' perayu.

Pada hari writ difailkan, perayu telah juga memasukkan suatu saman dalam kamar yang disokong oleh afidavit yang diikrarkan oleh perayu. Afidavit itu mengandungi, antara lainnya, perkara-perkara yang tersebut dalam penyata tuntutan perayu (seperti yang dihuraikan di atas). Perakuan
F segera juga difailkan bersama dengan saman dalam kamar itu. Defendan memasukkan afidavit jawabannya. Dalamnya, defendan menafikan tohmahan-tohmahan dalam afidavit perayu itu dan menuntut perayu membuktikannya. Afidavit defendan ini diikrarkan pada 17 Ogos 1992. Pada 19 Ogos 1992 pula, perayu mengikrarkan suatu afidavit lanjutan yang mengekshibitkan surat ditulis defendan kepada Prakash.

G

Pada hari perbicaraan saman dalam kamar itu, penghakiman persetujuan telah dirakamkan. Berekoran dari siaran dalam akhbar-akhbar mengenai penghakiman persetujuan itu, Karpal Singh telah membuat laporan polis yang meminta polis membuat siasatan berkaitan penghakiman persetujuan itu dan penerbitan-penerbitan lucah berkenaan. Sebelum
H laporan polis itu dibuat, Karpal Singh telah mengemukakan kepada Parlimen suatu pita lucah. Siasatan polis atas perkara-perkara ini mengakibatkan perayu menghadapi pertuduhan-pertuduhan tersebut di perenggan (1) di atas.

Perbicaraan perayu dilangsungkan di hadapan hakim terpelajar
I mahkamah sesyen ('hakim terpelajar'). Pendakwa kemukakan pita lucah itu sebagai ekshibit dan dengan bantuan saksi-saksi pakar, pendakwa

membuktikan bahawa perayulah yang beradegan dalam pita lucah itu. Hanya dua pelakon dalam pita itu — iaitu seorang perempuan dan seorang lelaki.

Dalam pembelaannya, perayu membuat kenyataan tanpa bersumpah yang mengisahkan persengketaan antaranya dengan Karpal Singh. Perayu juga, antara lainnya, menekankan bahawa Karpal Singh mempunyai kepentingan kewangan kerana tindakan fitnah terhadapnya. Seterusnya perayu meriwayatkan bagaimana beliau mendengar khabar-khabar angin mengenai pita yang mengandungi imej-imejnya. Perayu mengesyaki defendan yang mewujudkan pita itu. Ini diperkuatkan pula oleh keterangan S Murthi ('DW4') yang telah melihat sendiri pita itu. Malangnya, DW4 tidak mengambilmilik pita itu. Berasaskan keterangan-keterangan inilah perayu mengambil tindakan sivil terhadap defendan. Bagi mengukuhkan pembelaannya, perayu juga kemukakan saksi-saksi pakar untuk mengaburkan keterangan pendakwa yang menudingkan perayu sebagai pelakon lelaki dalam pita lucah itu — kabur dalam ertikata menyebabkan kes pendakwa terhadap perayu secara munasabahnya diragui.

Setelah mendengar kesemua keterangan-keterangan, hakim terpelajar telah memutuskan bahawa perayu adalah bersalah atas tuduhan pokok ('principal charge'). Setelah disabitkan, perayu kemudiannya dikenakan hukuman penjara satu bulan dan denda RM2,000 dan jika gagal menjelasnya, dua minggu penjara. Perayu merayu ke mahkamah ini atas kedua-dua sabitan dan hukuman.

Isu pertuduhan

Isu pertama yang dibangkitkan oleh peguambela terpelajar perayu ('peguam terpelajar') ialah mengenai pertuduhan. Dikatanya bahawa pembelaan tidak diberi masa yang cukup untuk telitikan tuduhan pindaan dan tuduhan alternatif. Juga tidak dinyatakan dalam tuduhan-tuduhan itu butir-butir yang cukup untuk membolehkan perayu menyediakan pembelaannya. lampiran kepada tuduhan-tuduhan itu tidak mengenalpastikan bahagian-bahagian yang dikatakan palsu. Kesemuanya ini, tegas peguam terpelajar itu, menempatkan perayu dalam keadaan terpaksa meneka-neka apakah pertuduhan-pertuduhan ke atasnya. Ditekankan oleh peguam terpelajar itu bahawa isu ini dibangkitkan di peringkat permulaan prosiding seperti ternyata dalam ms 35–37 lampiran A. Mahkamah sesyen, bagaimanapun, menolak bantahan perayu atas pertuduhan-pertuduhan itu. Perayu tidak puas hati. Perayu merayu ke Mahkamah Tinggi. Rekod rayuan, di ms 57–60, menunjukkan bagaimana perayu gagal untuk menangguhkan prosiding sementara menunggu keputusan rayuan. Atas isu ini, timbalan pendakwa raya terpelajar ('TPR terpelajar') menghujahkan bahawa penghujahan-penghujahan berkenaan pertuduhan itu tidak wajar dipertimbangkan oleh mahkamah ini kerana ianya telah diperdebatkan dalam rayuan di Mahkamah Tinggi. Dan Mahkamah Tinggi telah menolak rayuan perayu itu. Dan rayuan itu adalah bersumber dari ketidakpuashatian perayu dengan keputusan mahkamah

sesyen yang menolak bantahannya mengenai dan di sekitar isu berkenaan dengan pertuduhan pindaan dan pertuduhan alternatif. Mahkamah ini bersetuju dengan hujah TPR terpelajar itu. Oleh itu, mahkamah ini tidak menimbangkan hujah-hujah perayu itu.

Isu perlanggaran s 129 Kanun Acara Jenayah (NMB Bab 6)

Dari isu pertuduhan, peguam terpelajar beredar kepada isu perlanggaran s 129 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Peguam terpelajar itu menarik perhatian mahkamah ini kepada ms 884 dan 885 dalam rekod rayuan. Di situ, hakim terpelajar telah menyatakan: 'Defence also submitted that the sanction of the High Court is necessary before a prosecution under ss 193 and 199 of the Penal Code (FMS Cap 45) as required under s 129(i)(b) of the Criminal Procedure Code (FMS Cap 6). The sanction by the Public Prosecutor is implicit in the presence of Dato' Stanley who was then the head of criminal prosecution in the Attorney General's Chambers. Therefore, this submission is misconceived.'

Seksyen 129(i)(b) KAJ itu adalah seperti berikut:

> (i) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance —
>
> (a) ...
>
> (b) of any offences punishable under section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the Penal Code except with the previous sanction of the Public Prosecutor or when such offence is committed in or in relation to any proceeding in any Court on the complaint of such Court;
>
> (c) ... .

Diperturunkan juga sub-ss (ii)–(v) s 129 itu yang berbunyi:

> (ii) The provisions of subsection (1) with reference to the offences named therein apply also to the abetment of such offences and attempts to commit them.
>
> (iii) The sanction referred to in this section shall be in writing and may be expressed in general terms and need not name the accused person, but it shall so far as practicable specify the court or other place in which and the occasion on which the offence was committed.
>
> (iv) When such sanction is given in respect of any offence referred to in this section the Court taking cognisance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.
>
> (v) No such sanction shall remain in force unless acted upon within one month from the date on which it was given.

Pihak pendakwa (dalam perenggan 8 penghujahan bertulisnya) mengakui tiadanya sanksi bertulis daripada Pendakwa Raya. Ditonjolkan pula oleh pembelaan akan ketidakwujudan pengaduan oleh Pendakwa Raya atau mahkamah. Lalu dihujahkan oleh peguam terpelajar bahawa seluruh prosiding dalam mahkamah sesyen itu menjadi batal (nullity). Bagi menyokong hujah ini, peguam terpelajar itu mengenengahkan kes *Datuk*

Mahindar Singh v PP [1987] 2 CLJ 39. Di ms 40 laporan kes itu, mahkamah menyatakan: 'If the complainant is not the Public Prosecutor ... then, in respect of the offences named in s 129(i)(b) ... the magistrate only takes cognizance of such offences in the complaint when, either: (1) it has the previous sanction of the Public Prosecutor ... ; or (2) the complaint is from the court where the offence was committed in or in relation to any proceeding in that court.' Dalam rayuan ini, peguam terpelajar mengulangi, tiada sanksi dan pengaduan oleh mahkamah.

Seterusnya peguam terpelajar merujuk kepada kes *Hassan bin Isahak v PP* [1948–49] MLJ Supp 179 (di ms 179–180) — khususnya kepada penghakiman Yang Arif Pemangku Hakim Besar Pretheroe yang berbunyi:

> Mr Conaghan submitted, however, that the sanction required by s 139 of the Criminal Procedure Code is 'less potent' than the fiat of the Attorney General and that the absence or such sanction did not deprive the court of jurisdiction and any proceeding of the court in the absence of such sanction was merely an irregularity of procedure. In support of his submission Mr Conaghan called in aid s 448(b) of the CPC which provides that no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of ... 'the want of any sanction required by s 139 of the Code'. The latter part of the section qualifies the provision we have quoted, but it is certainly a strong argument to support the contention that want of sanction under s 139 does not deprive the trial court of jurisdiction.
>
> A great weight of judicial decisions is however against this submission, and we are in agreement with those decisions. In our opinion the want of the prior sanction of the Public Prosecutor under s 139 deprives the court of jurisdiction, and any proceedings in such circumstances are a nullity .... From the foregoing it will be clear that the first ground of appeal fails because, in the absence of sanction, the proceedings in the district court on 24 July were null and void and consequently the appellant was never in peril on that day.

Selanjutnya peguam terpelajar itu menyatakan bahawa kes *Datuk Mahindar Singh* telah juga menyentuh mengenai penghujahan berkenaan dengan kehadiran timbalan pendakwa raya yang menjalankan pendakwaan terhadap yang dituduh. Mahkamah dalam kes *Datuk Mahindar Singh* itu menegaskan (di ms 40): 'With regard to the matter of the sanction, it will be noted that the sanction of the Public Prosecutor (Solicitor General or a deputy public prosecutor) is required to be a 'previous' sanction and that it has, inter alia, to be in writing (see sub-s (iii) of s 129), clearly nullifying the argument of the learned DPP that the presence of such an officer at a subsequent hearing of the charges implies that the said officer has sanctioned the prosecution of the offences named in s 129 of the Code.'

Meneruskan dengan penghujahannya lagi, peguam terpelajar merujuk kepada kes *Re Muthu Moppan* AIR 1937 Mad 301. Di ms 302, Yang Arif Hakim King, antara lainnya, kata: '... The accuseds in this case are being prosecuted for an offence. They say they have already been acquitted of that offence. Is that acquittal valid? Does it remain in force? Has it ever had any force? Can a court take any notice of it? The answer to these questions is, in my opinion, clear and apparent at once on a perusal of s 530 of the Code. According to that section, if any magistrate 'not being empowered by law

A on his behalf' tries an offender his proceedings shall be void. The submagistrate of Erode was certainly empowered by s 28 to try an offence under s 186 of the Indian Penal Code but was he empowered to try these offenders for this particular offence? Clearly not, for s 195 prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void, his charge was void, his judgment of B acquittal was void ... .' Oleh itu, tegas peguam terpelajar, hakim terpelajar boleh membicarakan kesalahan itu (take cognizance of the offence) jika sekiranya s 129 KAJ dipatuhi.

Peguam terpelajar seterusnya menekankan bahawa kes *Pitchaykutty v PP* [1961] MLJ 293, antara lainnya mengatakan (di ms 295): '... As C Hyndman-Jones CJ pointed out in *Salleh*'s case, the object of requiring a sanction to be given before prosecution is to ensure that prosecutions under these sections shall be instituted only after due consideration.'

Selepas menarik perhatian mahkamah ini kepada ms 1656–1659 dan 1661 dalam Dr Sir Hari Singh Ghour, *Penal Law of India* (10th Ed) peguam D terpelajar menyatakan bahawa perkara sanksi ini dibangkitkan sebelum penghakiman diberi oleh mahkamah sesyen sungguhpun perbicaraan telah selesai. Pada masa itu, tegas peguam terpelajar itu, s 422 KAJ itu tidak boleh digunapakai oleh mahkamah sesyen kerana ianya hanyalah untuk mahkamah yang mendengar rayuan. Oleh demikian, hakim terpelajar tidaklah boleh membetulkan kecacatan (defect) ini. Bagaimanapun, E peguam terpelajar itu menganjurkan bahawa di peringkat itu, hakim terpelajar sepatutnya membebaskan yang dituduh kerana kecacatan itu.

Dalam jawapan bertulisnya, pihak TPR terpelajar telah, antara lainnya, menyatakan: '... the sanction is implicit in the fact that the proceedings against the appellant was instituted and conducted by a deputy public F prosecutor; ... . The granting of sanctions under s 129 of the Criminal Procedure Code is not something that needs to be done personally by the Public Prosecutor. Such being the case, deputy public prosecutors are empowered under s 376(iii) of the Criminal Procedure Code to exercise the power of the Public Prosecutor which includes the granting of sanctions under s 129 of the Criminal Procedure Code ... . It is humbly submitted G that the requirement of sanctions applies only where prosecutions are carried out other than by Public Prosecutor or his alter ego, the deputy public prosecutor.'

Seterusnya, TPR terpelajar merujuk kepada definasi 'complaint' dalam s 2 KAJ yang berbunyi: ' "Complaint" means that allegation made orally or H in writing to a Magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence.' Berasaskan definasi ini, TPR terpelajar menyatakan bahawasanya: '... the charging of the appellant in the sessions court ... can also amount to a complaint under the CPC. When the DPP tenders a charge to be read and explained to an accused, he is in fact making an I allegation in writing to a magistrate (or in this case the sessions court judge) with a view to his taking action under this Code (trying the appellant for the offence charged) that some person (the appellant) has committed or is guilty of an offence.'

Secara alternatifnya pula, TPR terpelajar berhujah bahawa '... such want of sanction is a mere irregularity which is curable by virtue of s 422 of the CPC ... The purport of the above section is that a want of sanction will only vitiate proceedings if such want of sanction has occasioned a failure of justice'. Menyentuh berkenaan 'failure of justice', TPR terpelajar merujuk kepada kes *Lorensus Tukan v PP* [1988] 1 CLJ 143 dalam mana di ms 147, George Seah SCJ kata: '... in deciding whether there has been a failure of justice in consequence of a misdirection the appellate court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted ...'.

Dalam meneruskan penghujahannya, TPR terpelajar merujuk kepada kes *Joginder Singh v PP* [1984] 2 MLJ 133, di mana Hakim Ajaib Singh telah menyatakan (di ms 139): 'Justice is well served by s 422 of the CPC (FMS Cap 6) for it enables a superior court sitting in appeal or in revision to remedy technical defects which may have inadvertently arisen in a trial — "defects which ought not to be made the means of culprits escaping the just penalties of their crimes" '.

Setelah menilaikan dengan teliti penghujahan-penghujahan kedua-dua belah pihak atas perkara ketiadaan sanksi ini, mahkamah ini dapati bahawa:

(a) penghujahan TPR terpelajar, dalam perenggan 9 di atas, menunjukkan suatu pendekatan yang berlogika dan sukar dinafikan kemunasabahannya. Tidak terdapat di dalam penghakiman kes *Datuk Mahindar Singh* perkara-perkara yang diperhujahkan oleh TPR terpelajar. Kerana itu, sukarlah diketahui sama ada rasional sepertimana yang telah dibentangkan di dalam perenggan 9 di atas telah turut disajikan kepada mahkamah dalam kes *Datuk Mahindar Singh* itu. Mahkamah dalam kes *Datuk Mahindar Singh* berpendapat bahawa sanksi Pendakwa Raya (Peguamcara Negara atau seorang timbalan pendakwa raya) adalah diperlukan dan ianya mestilah suatu sanksi yang diberi terlebih dahulu (previous sanction). Mahkamah seterusnya menekankan bahawa sanksi itu dikehendaki dibuat secara bertulis sambil merujuk kepada s 129(iii). Dikatakan oleh mahkamah itu lagi bahawa peruntukan-peruntukan itu dengan jelasnya melumpuhkan penghujahan TPR terpelajar yang mengutarakan bahawa kehadiran TPR terpelajar di dalam perbicaraan atas pertuduhan-pertuduhan tersebut membawa implikasi bahawa pegawai itu telah mengsanksikan pendakwaan kesalahan-kesalahan yang tersebut dalam s 129 KAJ itu. Bagaimanapun, mahkamah ini berpendapat bahawa apa yang dihujahkan oleh TPR terpelajar dalam perenggan itu tidaklah boleh ditolak begitu sahaja kerana kelogikannya itu adalah amat ketara. Dengan lain perkataan, sungguhpun sanksi yang terdahulu yang diperlukan dibuat secara bertulis dikehendaki oleh s 129 sebelum pendakwaan atas kesalahan-kesalahan yang tersebut di dalam s 129 itu, kegagalan mengemukakan sanksi itu tidak sewajarnya membatalkan prosiding jika sekiranya prosiding itu dijalankan oleh pihak timbalan pendakwa raya sendiri,

iaitu seorang pegawai yang diberi kuasa di bawah s 129 untuk mengeluarkan sanksi yang berkenaan;

(b) bahawa bantahan-bantahan terhadap ketiadaan sanksi di dalam kes *Datuk Mahindar Singh* telah dibuat di peringkat yang awal iaitu sebelum pendakwa mengemukakan keterangan-keterangannya. Selain dari itu, mahkamah dalam kes *Datuk Mahindar Singh* itu telah merujuk kepada kes *Hassan bin Isahak* yang dibangkitkan oleh peguam terpelajar di dalam perenggan di atas. Mahkamah itu telah menyatakan bahawa kes *Hassan bin Isahak* dan *Pitchaykutty v PP* adalah kes-kes yang menyentuh berkenaan dengan ketidakbolehpakaian (non-applicability) s 422 KAJ kepada kes-kes seperti kes *Datuk Mahindar Singh* itu. Seterusnya, mahkamah itu menyatakan (di ms 41): 'In any event I also think that where an objection has been taken at the earliest possible opportunity and the objection, though valid, is overruled, it would be difficult for an appellate court to have resort to s 422 of the said Code not to set aside the proceedings for want of sanction assuming the provision in s 422 relating to the want of sanction applies notwithstanding the decision in *Hassan bin Isahak* ... . For myself I do not think I can disregard these decisions as although the provisions interpreted were those of the SS Code, those provisions are in pari materia with the FMS Code'. Petikan penghakiman mahkamah dalam kes *Hassan bin Isahak* di dalam perenggan di atas menunjukkan mahkamah dalam kes *Hassan bin Isahak* itu bersetuju dengan keputusan-keputusan kehakiman yang berlawanan dengan penghujahan yang dibuat oleh En Conaghan. Malangnya, mahkamah itu tidak pula menyebut atau menyenaraikan keputusan-keputusan kehakiman yang dipersetujui oleh mahkamah itu. Dengan demikian, tidaklah mahkamah ini dapat mengekori atau memahami taakulan di sebalik persetujuan dengan keputusan-keputusan itu. Seterusnya, mahkamah di dalam kes *Hassan bin Isahak* menyatakan (di ms 180): 'We agree with the decision in *Muthu Moopan & Anor v R* ILR (1937) Mad 664 and with the reasons given for arriving at that decision. Also it is significant that the provision in the Indian Criminal Procedure Code which was identical with s 448(b) of our Code was repealed in the year 1923. In our opinion, that provision in our Code should also be repealed'. Kes *Muthu Moopan* melibatkan s 530 Kanun Acara Jenayah India. Mengikut Yang Arif Hakim King: 'According to that section if any magistrate not empowered by law in his behalf tries an offender his proceedings shall be void'. Perlu ditekankan kes *Muthu Moopan* tidak memperkatakan mengenai seksyen di dalam Kanun Acara Jenayah India yang pari materia dengan s 448(b) Kanun Acara Jenayah Straits Settlement yang adalah pari materia dengan s 422 KAJ kita. Lantas kes *Hassan bin Isahak* ini tidaklah boleh diguna untuk mematahkan penghujahan pihak TPR terpelajar dalam perenggan di atas. Lagi pula mahkamah dalam kes *Hassan bin Isahak* tidak sama sekali menyatakan bahawa s 448(b) tidak boleh digunapakai seperti yang telah diperhujahkan oleh TPR terpelajar. Mahkamah dalam kes *Hassan bin*

Isahak hanya menyatakan bahawa peruntukan di dalam Kanun Acara Jenayah India yang berpari materia dengan s 448(b) Kanun Acara Jenayah SS telah dimansuhkan (repealed) dalam tahun 1923 dan mahkamah itu menyuarakan pendapatnya bahawa peruntukan di dalam Kanun Acara Jenayah SS sepatutnya juga dimansuhkan. Kes *Pitchaykutty v PP* pula melibatkan s 448 Kanun Acara Jenayah Straits Settlement. Seksyen 448 itu berbunyi seperti berikut:

> Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) ...
>
> (b) the want of any sanction required by s 139; ... unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

YA Rigby H dalam kes *Pitchaykutty* menyatakan (di ms 295):

> No reference was apparently made during the hearing of *Hassan bin Isahak*'s appeal to the very much earlier case of *Salleh & Anor v R* 10 SSLR 27, which expressly decided, following earlier Indian decisions, that the want of a sanction does not vitiate a conviction, unless there is evidence that a failure of justice has been thereby occasioned. That decision, indeed, gives full effect to the express wording of the latter part of s 448 of the Criminal Procedure Code .... Whilst I consider myself bound by the decision of the court in *Hassan bin Isahak*'s case, I would with respect, take leave to doubt whether the court was correct in expressly relying upon the Indian case of *Muthu Moopan*, having regard to the fact that that decision was itself based upon the express provisions of s 530 of the Indian Code which finds no counterpart in our Code.

Ini memperkukuhkan pendapat mahkamah ini seperti yang tersebut sebelum ini. Apa yang berlaku di dalam kes *Pitchaykutty* ialah bahawa tarikh '5 Jun' telah disebut di dalam sanksi untuk mendakwa manakala tarikh yang sepatutnya disebut dalam sanksi itu ialah '7 Julai'. Dalam hal ini, Hakim Rigby berkata (di ms 295): 'By inadvertence the date of the assault upon the appellant was inserted in the sanction instead of the date of the complaint made by the appellant to the magistrate arising out of such assault. To set aside these proceedings and to hold them to be a nullity merely by reason of the incorrect date having been inserted by mistake in the sanction to prosecute, would make a farce of the administration of justice and hold it up to ridicule and contempt. I am satisfied that it was a defect curable under s 448(a) of the Criminal Procedure Code and that such defect certainly in no possible way occasioned any failure of justice'. Beredar kepada kes *Salleh & Hussein v R* (yang dirujuk oleh kes *Pitchaykutty v PP*), fakta kes itu menunjukkan sanksi untuk pendakwaan tidak dikemukakan. Yang Arif Hakim Besar Hyndman-Jones menyatakan: 'The next point was the absence of previous sanction or complaint in this case as required by s 135(1)(a) of the CPC .... Now the object of this section is to ensure that prosecutions under the sections enumerated should be instituted only after due consideration. In India this has been held to be the intention of the

A legislature. *R v Mohamed Husin* 16 WRCr 37 ... To my mind the weight given to the prosecution by the presence and evidence of a responsible officer of superior rank and standing satisfies the object of the section — that a prosecution thereunder should only be instituted after due consideration .... Furthermore, the want of a sanction or a complaint does not vitiate a conviction unless there is evidence thata failure of justice has B been thereby occasioned, *Kally v Mookerjee* 13 CLR 117; *Sunder Dasadh v Sital Madho* ILR 28 Cal Rep 217; and in this case there is no such evidence'. Berbalik kepada rayuan di hadapan mahkamah ini sekarang, mustahaklah diingatkan bahawa perkara ketiadaan sanksi ini telah diketengahkan oleh pihak perayu pada akhir perbicaraan, iaitu semasa penghujahan dibuat. Ini C bererti bahawa perayu mempunyai segala peluang untuk menyoalbalas setiap saksi yang dikemukakan oleh pihak pendakwa, dan begitu juga perayu mempunyai peluang untuk mengemukakan saksi-saksinya. Mahkamah ini telah teliti rekod rayuan dan tidak mendapati sebarang keterangan yang boleh menunjukkan adanya kegagalan keadilan (failure of justice) atau berlakunya ketidakadilan terhadap perayu dengan kerana D ketiadaan sanksi itu. Berasaskan pada rasional yang dibentangkan di dalam perenggan ini dan perenggan-perenggan sebelum ini, mahkamah ini berpendapat bahawa s 422 KAJ bolehlah digunapakai dalam rayuan ini dan justeru itu mahkamah ini menolak hujah-hujah peguam terpelajar perayu mengenai isu ketiadaan sanksi dan pengaduan mahkamah itu.

E *Isu di sekitar eks P12*

Ekshibit P12 ini ialah sebuah pita video. Karpal Singh ('SP11') yang mengemukakan ekshibit ini. Beliau jumpa P12 di tepi pintu pejabatnya. Sebelum penemuan itu, seorang yang tidak dikenalinya menelefonnya dan memberitahunya mengenai P12 berada di tepi pintu itu. P12 diambil dan F ditontoni oleh SP11. Kemudian SP11 tentukan P12 sentiasa disimpannya berkunci. Tiada siapa berpeluang mengambilnya sehingga P12 itu diberi kepada Timbalan Speaker Dewan Rakyat ('SP2'). Apabila SP2 diganti oleh Johar ('SP10') sebagai pengerusi persidangan Parlimen di hari itu, P12 diambil oleh SP10 yang telah memberinya kepada En Abdullah bin Abdul Wahab ('SP4'), Penolong Kanan Setiausaha Parlimen. SP4 menyimpan G P12 dalam keadaan sentiasa berkunci sehingga diberinya kepada setiausaha sulit speaker, K Nadarajah ('SP5'). P12 juga disimpan dalam keadaan sentiasa berkunci oleh SP5 yang kemudiannya memberi P12 itu kepada Tan Sri Mohd Zahir Ismail, Speaker Dewan Rakyat, yang terus memberi P12 itu kepada Dato' Hj Mohd Zaman Khan ('SP6'). Selepas itu, SP6 H memberi P12 kepada ASP Jamaluddin Razali ('SP16') yang membuat laporan polis di Balai Polis Sentul.

Ekshibit P12 ini menggambarkan adegan-adegan seks antara perayu dengan seorang wanita yang tidak dikenalpasti. Mengenai eks P12 ini, hakim terpelajar mengulas seperti berikut: 'In an attempt to prove the charges against the accused, the prosecution relied on the pornographic I video tape ('P12') which I admitted after strenuous objections by the defence. Defence also objected to P12 as being irrelevant to the charge since there is no evidence of nexus between P12 and the tape referred by the

accused'. Di hadapan mahkamah ini, peguam terpelajar menimbulkan semula isu P12 tidak relevan dan tidak patut diterima sebagai keterangan. A

Mengenai kerelevanan P12 ini, peguam terpelajar merujuk kepada s 11 Akta Keterangan 1950 dan menghujahkan bahawa pihak pendakwa telah gagal membuktikan P12 adalah suatu fakta dalam pertikaian (fact in issue) atau suatu fakta yang relevan. Seterusnya peguam terpelajar mengatakan: 'We cannot inquire generally into anything containing images of the accused therefore this must be the tape referred to in the affidavit without any nexus being shown of credible evidence that this is the very tape accused meant when he affirmed the affidavit. The prosecution cannot depend on inferences to say that this is the tape the accused was talking about. It is our case that the police made no effort in determining what is the tape that the appellant had in mind when he affirmed the affidavit .... The police say they made efforts and found copies of P12 and no others'. B C

Dalam menjawab isu ini, TPR terpelajar bersetuju dengan peguam terpelajar itu bahawa polis menjumpai dan merampas empat pita-pita lain yang mempunyai kandungan-kandungan yang sama dengan kandungan eks P12. Keempat-empat pita itu dikemukakan sebagai keterangan dan ditandakan sebagai eks P38, P39A, P39B dan P39C. Selanjutnya TPR terpelajar mengujar '... These tapes, including exh P12, show that the video tapes were in circulation at or about the time of the offence committed by the appellant. They were also tendered to show that tapes of their content were the only ones in circulation and that the so-called Rama tape does not exist. According to Nasir (PW22), the contents of all five video tapes (exh P12, P38, P39A–C) are all the same'. D E

Di ms 825 rekod rayuan, hakim terpelajar telah merujuk kepada Appendix A pertuduhan dan menekankan bahawa appendix itu 'alleged that the defendant had secretly video taped him while he was in embarrassing positions without his knowledge by using a hidden video camera'. Selepas itu hakim terpelajar, sambil merujuk kepada afidavit P6, berkata 'Ravindran had 'superimposed' or 'spliced' images of the accused with other pornographic images to create a composite tape'. Berasaskan kepada fakta-fakta ini, hakim terpelajar telah memutuskan bahawa P12 adalah relevan 'to prove the charge as it is relevant to the fact in issue and a vital link to the alleged falsity'. F G

Mahkamah ini berpendapat bahawa keputusan hakim terpelajar itu disokong oleh keterangan-keterangan — khususnya keterangan di dalam P6.

Mengenai penerimaan P12 sebagai keterangan, peguam terpelajar, antara lainnya, menghujahkan bahawa s 63 Akta Keterangan India tidak hanya menggunakan perkataan 'means' tetapi menggunakan perkataan-perkataan 'means and includes'. Ditegaskan oleh peguam terpelajar itu bahawa: 'there is no difference in legal terminology between "includes" and "means and includes" ' dan peguam terpelajar itu merujuk beberapa kes daripada India. Seterusnya peguam terpelajar itu menekankan: 'In any case even if s 63 were not exhaustive the learned sessions court judge has not defined precisely what is the new category that he is creating. It is not H I

A enough to make an ad hoc admission of P12. A new class must be precisely defined'. Peguam terpelajar selanjutnya menegaskan: 'In fact throughout the entire case no opinion, let alone facts, were ever led in evidence that P12 was made from the original or compared with the original'. Meneruskan penghujahannya lagi, peguam terpelajar merujuk kepada ilustrasi (illustration) (c) di s 63 dan menghujahkan bahawa P12 'falls squarely B within the prohibition of illustration (c) ... . We called an expert, SD4, who stated that features of a person could be altered by a process known as insert-editing, ie electronic edits ... . DW4 said that such a process cannot be detected unless the very tape on which the editing was done was examined. As P12 was definitely a copy there was no way to detect the C traces of such editing ... . In any case the essential point is that no one can say that P12 was not doctored. The prosecution expert admits it could have been done but the cost would be high'.

Di ms 3B–37 dalam penghujahan bertulis peguam terpelajar (Bahagian III(B)) terdapat ringkasan penghujahan peguam terpelajar di atas perkara penerimaan P12 sebagai keterangan. Mengikut ringkasan itu, P12 adalah D suatu dokumen seperti yang didefinasikan oleh Akta Keterangan 1950. P12 perlu mematuhi segala kehendak Akta Keterangan. P12 bukanlah keterangan perimer (primary) kerana ianya bukan dokumen asal. P12 tidak boleh dibuktikan sebagai keterangan sekunder (secondary) kerana ia tidak terjatuh ke dalam kategori-kategori keterangan sekunder yang dinyatakan di dalam s 63 (does not come within the categories of secondary evidence set E out under s 63). Seksyen 63 adalah menyeluruh (exhaustive) mengenai kategori-kategori keterangan sekunder. Seksyen 63 ilustrasi (c) dengan jelasnya memutuskan (rules) bahawa P12 bukan keterangan sekunder. Walaupun P12 terjatuh dalam bidang s 63 ianya tidak akur (conform) kepada kehendak-kehendak (requirements) s 65(a) atau (c). Seksyen 60(3) F tidak mengecualikan (exempt) P12 daripada aturan-aturan (rules) mengenai keterangan dokumentar. Selain dari semua ini P12 mestilah mematuhi prasyarat-prasyarat perundangan kes (case law prerequisites) mengenai keperluan membuktikan keasalannya (the need to prove its origin) 'providence' dan sejarahnya.

G Dalam penghujahan bertulisnya, TPR terpelajar menghujahkan bahawa eks P12 itu adalah 'a copy of an original'. TPR terpelajar seterusnya merujuk kepada s 65(1)(a)(i) Akta Keterangan 1950 yang berbunyi:

> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evicence in the following cases:
>
> (a) when the original is shown or appears to be in the possession or H power —
>
> (i) of the person against whom the document is sought to be proved.

TPR terpelajar juga menarik perhatian mahkamah ini kepada penghakiman hakim terpelajar di ms 832-834 rekod rayuan. Antara lainnya, penghakiman I itu berbunyi: 'The requirement of cl 1(a)(i) is that the prosecution must prove that the original appears to be in possession of the accused. 'Appears' bears a lesser burden than 'shown'. So long as there is evidence that the

prosecution had done all that is possible to procure it, the requirement is satisfied'. TPR terpelajar juga telah merujuk kepada s 65(1)(c) Akta Keterangan 1950 yang berbunyi:

> ... when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect, produce it in reasonable time.

Berkenaan dengan cl 1(c) ini, hakim terpelajar dalam alasan penghakimannya telah menyatakan seperti berikut: 'As for cl 1(c), the evidence adduced showed that prosecution had satisfactorily accounted for the absence of the original and their inability to produce it ... . The IO (PW15) had said that from his investigations, the location of the recording in P12 was in accused's office ... . Various attempts had been made to trace the original. Notice under s 51 CPC was also served on accused ... . The failure of the accused to respond to the notice is an irresistible inference that he was in possession of it. Accused's failure to reply to the notice entitles the prosecution to produce secondary evidence of it ... . Everything was done within the powers of the police to obtain the original of P12 but it could not be found ... . There was no neglect or default in good faith on the prosecution to search and obtain the original or produce it within reasonable time'. SP15 (pegawai penyiasat di dalam kes ini) dalam keterangannya mengatakan: '... I did also investigate to determine the source of the tape but I was not successful ... . I attempted to ascertain the anonymous person mentioned by Mr Karpal who sent the tape'. Di dalam keterangannya lagi, SP15 menyatakan bahawa beliau telah mencuba untuk mencari S Ravindran dan SP15 kata bahawa Ravindran 'was alleged to have made the tapes and agreed to the settlement out of court. That is why I looked for him pertaining to the accused's affidavit'. Seterusnya SP15 juga menyatakan: 'I wanted Ravindran to interview him to ask him whether he had done as alleged that is to superimpose the images of accused into a composite tape. He is now missing. I have had his whereabouts checked and advertised as in P22A–B ... . In addition to press coverage I also sent out a pool of detectives and officers to look for him in Kuala Lumpur and Ipoh. I have also despatched officers to various embassies to check whether he had left the country ... . No success in tracing him ... . Apart from looking for him I also made efforts to track the source of I/D 12. It is an ongoing process I am still trying. Raids done in country at various video centres. To date no success ... . I instructed my officers to trace source of the video tape. We instructed police to check all video tape shops to see whether the tapes were available to trace the source. We did not manage to attract to the source of the video tape ... . From my investigations, other tapes recovered, that is tapes identical to I/D 12 ... . Investigations in this case are done nationwide'. Dengan adanya keterangan-keterangan sedemikian, mahkamah ini tidak mendapati sebarang sebab munasabah untuk menggangu-gugat keputusan yang dibuat oleh hakim terpelajar seperti yang dipetik di atas.

Keterangan-keterangan SP15 juga menunjukkan bahawa beliau telah menyerahkan ke atas perayu suatu notis di bawah s 51 KAJ. Mengenai notis

A ini TPR terpelajar menyatakan: 'it is humbly submitted that the notice under s 51 of the Criminal Procedure Code (exh P25) constitutes 'such notice to produce it as is prescribed by law'. There can be no question that the Criminal Procedure Code is not a law. Section 66 of the Evidence Act 1950 itself does not make any provision as to any such notice to produce'. Seksyen 66 Akta Keterangan 1950 berbunyi:

B

> Secondary evidence of the contents of the documents referred to in s 65(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers
C reasonable under the circumstances of the case ... .

Seterusnya, TPR terpelajar menegaskan: 'on 8 March 1993 the investigating officer (SP15) issued a notice to the appellant. The notice was received by the appellant. He, however, not only failed to respond and comply with the notice, he in fact ignored the notice. This notice has been
D tendered and marked as exh P25 ... . One very pertinent point to note at this moment is that the appellant did absolutely nothing after receiving the notice under s 51 CPC (exh P25). He did not explain or even just tell the investigating officer that the tape was not in his possession and that it was Murthi (DW4) who knows the whole story. The story of Rama who was supposed to have the tape never came up. The story of Murthi (DW4) who
E was supposed to have gotten the tape from Rama never came up. The story of Rama who was subsequently missing never came up ... .' P25, kata TPR terpelajar, mengarahkan perayu untuk kemukakan 'any pornographic video tape with your image superimposed upon in your possession or under your control'. Selanjutnya, ujar TPR terpelajar: 'The notice was issued to give the appellant the chance to produce any other tape that would deflect the
F prosecution's case in which the video tape (exh P12), the only video tape, tells of the fabrication of false evidence by the accused. It is reasonable to expect that if the appellant was ready to and, in fact did, proceed to take court proceedings against Ravindran (his nepnew), such tape would form part of his evidence. This in itself is evidence enough for the court to conclude for the purposes of s 65(1)(a)(i) of the Evidence Act 1950 that
G such a tape is or appears to be in the possession or power of the appellant who is the person against whom the tape is sought to be proved ... . The conduct of the appellant in this matter is certainly not consistent with innocence'.

Setelah dihemati penghujahan-penghujahan kedua-dua pihak ini,
H mahkamah ini bersetuju dengan keputusan hakim terpelajar atas rasional yang diberinya dan atas taakulan terkandung dalam penghujahan-penghujahan TPR terpelajar yang diringkaskan di atas. Jika diambilkira keterangan-keterangan saksi-saksi pakar pendakwa (SP22) dan perayu (DW5) khususnya, bertambah kukuhlah lagi hujah TPR terpelajar yang menyarankan bahawa P12 itu sebenarnya berasalusul daripada pita video
I asal (actually has its origins from an original video tape). DW5, dalam keterangannya mengatakan: 'Yes, I can't say either way whether it had been tampered with or not'. Keterangan SP22 pula pada keseluruhannya

membenarkan penghujahan TPR terpelajar yang mengatakan 'the video tape (exh P12) is an untampered copy of the original'. A

Berhijrah kepada penghujahan-penghujahan kedua-dua pihak berkenaan s 60(3) Akta Keterangan 1950, mahkamah ini memutuskan bahawa rasional yang telah diberi oleh hakim terpelajar, seperti yang terdapat di dalam alasan-alasan penghakimannya di ms 834–836 rekod rayuan, adalah suatu rasional yang sukar dinafikan ketepatannya. Oleh itu, mahkamah ini tidak mendapati sebarang sebab untuk mengenepikan keputusan hakim terpelajar atas isu ini. B

Berasaskan penghuraian di atas, mahkamah ini berpendapat yang hakim terpelajar tidak silap dari sudut undang-undang dan fakta apabila beliau memutuskan yang P12 adalah boleh diterima (admissible) sebagai keterangan. Oleh itu, wajar sekalilah dikekalkan keputusan hakim terpelajar dalam menerima P12 sebagai keterangan. C

Isu keterangan pengecaman (identification)/keterangan pakar

Penghujahan bertulis peguam terpelajar menyingkapkan bagaimana hakim terpelajar gagal menimbangkan samada lapangan kepakaran (field of expertise) Dr Masatsuga Hashimoto (SP21) adalah suatu lapangan yang diiktiraf (a recognized field) oleh masyarakat saintis atau undang-undang (scientific or legal community). Dirujuk olehnya beberapa autoriti yang dikatanya menyokong hujahnya bahawa sesuatu teknik tertentu (particular technique) atau acara (method) hendaklah mempunyai pengesahan saintifik (scientific validity) dan diiktiraf (recognized) sebagai suatu lapangan kepakaran. Antara autoriti-autoriti itu ialah kes *R v Bonython* (1984) 15 Aust Cr R 364, *Carrol v Queen* (1985) 19 Aust Cr R 410 dan *R v Johnston* (1992) 69 CCC 395). D E

Pihak pendakwa pula telah merujuk kepada kes *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320 yang antara lainnya menegaskan bahawa seseorang pakar itu mestilah mempunyai kemahiran terkhusus (specially skilled) tetapi ianya tidaklah semestinya melalui pengajian khas (special study). Pakar itu boleh juga memiliki kemahiran terkhusus (specially skilled) melalui pengalaman (experience). Walaupun pakar itu tidak memperolehi pengetahuannya secara profesional, namun fakta itu hanya penting bagi penilaian (weight) dan bukannya penerimaannya (admissibility) (penghujahan bertulis TPR terpelajar di ms 46–48). F G

Mukasurat 838 rekod rayuan menunjukkan bagaimana hakim terpelajar mengambilkira kelayakan dan pengalaman SP21. Didapati juga di ms 254 dan 255 lampiran C penerbitan-penerbitan (publications) oleh SP21 — khususnya yang di No (5), (9) dan (13); manakala kertas-kertas yang dibentangkan di mesyuarat (meetings) tersenarai di ms 255 hingga 257 — khususnya yang di No 7, 9, 11, 13, 15, 16, 18, 19, 22 dan 24. Juga disenaraikan di ms 257–260 lampiran C laporan-laporan pemeriksaannya — khususnya yang di No 16, 19, 25, 36–38, 42, 44, 48–51. Kesemua ini — terutamanya yang dikhususkan di atas — menunjukkan pengetahuan dan pengalaman SP21 bagi membolehkannya berhak bertindak selaku pakar untuk mengecamkan siapakah pelakon lelaki di dalam eks P12 itu (keterangan-keterangan SP21 mengenai penerbitan-penerbitan, kertas- H I

kertas dan laporan-laporan yang dibuatnya itu terdapat di ms 263–265, 266–267 dan 312–313 rekod rayuan). Sekaligus juga, ketara sekali SP21 memiliki segala-gala yang disebutkan di dalam kes *R v Bonython* (yang dirujuk oleh peguam terpelajar perayu). Yang penting, seperti yang diperlukan oleh s 45 Akta Keterangan 1950, ialah 'specially skilled in that foreign law, science or art'. Kelayakan-kelayakan SP21 terpapar juga di ms 303–305, 307, 316, 334, 344–345 dan 351 dalam lampiran A.

Huraian-huraian terkandung di perenggan-perenggan 12.1–12.3 (khususnya perenggan 12.3) menyakinkan mahkamah ini bahawa hakim terpelajar adalah betul apabila ia kata SP21 adalah 'an expert on facial feature' (ms 841 rekod rayuan). Seterusnya hakim terpelajar telah dengan betulnya merumuskan 'Being an odontologist and conversant with morphological features of the face I do not doubt his ability' (ms 841 rekod rayuan). Di ms 843, hakim terpelajar telah mengulangi pendapatnya mengenai SP21 iaitu dengan berkata: 'He is an expert witness who is peritus in this field of study'.

Hujah peguam terpelajar perayu selanjutnya beredar kepada laporan yang dibuat oleh saksi pakar pihak pendakwa iaitu SP21. Dalam laporan itu SP21 membandingkan gambar-gambar video dengan gambar-gambar Maika Holdings Bhd (eks P13A–E) iaitu gambar-gambar yang diperolehi daripada Maika Holdings. Encik Ramanaidu, pengurus besar (general manager) Maika Holdings (SP8) telah kemukakan gambar-gambar itu. Perayu adalah di antara beberapa orang yang kelihatan dalam gambar-gambar itu, malahan dalam gambar P13E terpampang perayu seorang saja dan SP21 membuat konklusi bahawa pelakon lelaki di dalam P12 dan perayu di dalam P13A–E itu adalah lelaki yang sama. Dalam laporan tambahannya pula, SP21 telah membandingkan P13A–E dengan gambar-gambar perayu yang diambil oleh SP20 semasa perayu berada di mahkamah sesyen (P33A–D). Dan SP21 merumuskan bahawa orang yang terdapat di dalam kedua-dua set gambar-gambar itu adalah orang yang sama. Ditekankan oleh peguam terpelajar bahawa SP21 tidak membuat secara langsungnya perbandingan antara gambar-gambar video dengan P33A & D itu. Lantas peguam terpelajar itu membuat kiasan seperti berikut: 'All monkeys eat bananas, men eat bananas. Therefore men are monkeys'.

Menjawab hujah ini, TPR terpelajar menyatakan: 'the example of banana-eating monkeys and man is fallacious and a bad example because that example speaks of conditional approximates whereas the deduction of Dr Hashimoto (PW21) is one of absolute equals'. Mengenai hal ini, mahkamah ini dapati di ms 229, lampiran C, terdapat di bawah tajuk 'Chapter 2 — Purpose of Examination' penghuraian berikut: 'The purpose of this examination is to clarify whether a male person observed on the four still colour photographs is the same person as that or the male actor in the NTSC video tape and the PAL video tape which I received on 18 January 1983 or not'. Di ms 232 pula, laporan tambahan itu menyatakan: 'In the result of the comparative study abovementioned, I could not find any differences between a male person on the four still photographs which were taken at the Ipoh Sessions Court 2 on 17 March 1993 and a male person on the five photographs which I had received on 18 January 1993.

Furthermore, I could find many consistent findings between them ...' dan di ms 233, laporan itu mengulas: 'Therefore the result of the comparison of a male person on the four still colour photographs with the actor in the NTSC video tape is as same as the result of the comparison on a male person on the five colour photographs with the actor in the PAL video tape which I described in the examination report submitted on 11 February 1993. Based on this fact and the findings of my first examination, I conclude in my opinion that it was sufficient to confirm that the actor in the NTSC and PAL video tapes and the person on the four still colour photographs is the same person'. Nyatalah bahawa orang yang tertera di dalam P13A–E itu adalah sama dengan orang yang terdapat di dalam P33A–D itu. Oleh kerana orang yang ditunjuk di dalam P13A–E adalah sama dengan orang yang di dalam gambar video, maka jelaslah bahawa orang yang di dalam P33A–D itu adalah juga orang yang sama dengan orang yang di dalam gambar-gambar video itu. Sewajarnyalah begitu. Apatah lagi manakala P33A–D itu menunjukkan gambar perayu.

Selanjutnya peguam terpelajar menegaskan bahawa: 'the MHB photos are themselves not properly in evidence'. Ini adalah kerana PW8 tidak mempunyai jagaan (custody) atas gambar-gambar itu. Keterangan PW8 seperti dipetik oleh peguam terpelajar menyatakan: 'these are the photographs taken from me. I am not the photographer of these photographs ... . Photographs taken and kept in the human resources department and one for official use ... . I am not the guardian of these photographs, they were in the custody of another executive'. Eksekutif ini dicamkan oleh PW8. Namun demikian, ianya tidak menjadi saksi. Kerana itu, peguam terpelajar mengujarkan bahawa gambar-gambar itu (P13A–N) telah dengan salahnya diterima sebagai keterangan. Bagi menangkis hujah ini, TPR terpelajar menyatakan: 'True he said that the person who was in actual custody of the photographs was the public relations and human resource executive, one N Sugumaran who was offered but not called, but this is a situation where the documents belong to the company namely Maika Holdings. Just as an officer of a company may tender any company document, the group general manager of Maika Holdings tendered the photographs (each P13A–N). It is humbly submitted that Ramanaidu (PW8), while he may not have been the 'guardian' of the photographs, had control over them being the group general manager of Maika Holdings'. Mengenai isu ini hakim terpelajar, di ms 836 rekod rayuan, menyatakan: 'I find that calling of the custodian does not help because ASP Takbir had investigated into it. Therefore, the evidence of ASP Takbir is sufficient to admit P13A–E as secondary evidence under s 65(1)(c) of the Evidence Act 1950'. Walaubagaimanapun SP8 telah mengecamkan Sugumaran a/l Nagaman sebagai 'public relations and human resource executive' yang mempunyai penjagaan atas (custody) P13A–E itu (lampiran A, di ms 80). Muka surat 446, lampiran A, pula memperagakan, antara lainnya, nama Sugumaran a/l Nagaman sebagai salah seorang daripada saksi-saksi yang dihulur oleh pendakwa kepada pembela. Di ms 44, lampiran A pula, tercatat peguam terpelajar menyatakan yang beliau: 'require all witnesses except Tan Sri Mohd Zahir and ... .' Malangnya sehingga ke akhir kes, saksi

A N Sugumaran ini tidak pernah dipanggil sebagai saksi oleh pihak pembela. Dalam keadaan-keadaan sedemikian, tidaklah wajar dibangkit-pakaikan s 114(g) Akta Keterangan 1950. Kerana itu, mahkamah ini bersetuju dengan taakulan-taakulan TPR terpelajar dan hakim terpelajar itu.

Selanjutnya, peguambela terpelajar menganjurkan bahawa: 'The law of
B evidence requires that negatives must be produced before photos can be admitted into evidence'. Dan kerana pendakwa tidak mengemukakan negatif-negatif bagi P13A–N itu, maka gambar-gambar itu tidaklah sepatutnya diterima oleh mahkamah sesyen sebagai keterangan. Bagi menyanggahi hujah ini, TPR terpelajar memetik definasi 'document' di dalam s 3 Akta Keterangan 1950 yang adalah seperti berikut:

C

> 'document' means any matter expressed, described or howsoever represented upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of —
>
> (a) letters, figures, marks, symbols, signs, signals or other forms of expression, description or representation whatsoever;
>
> D (b) any visual recording (whether of still or moving images);
>
> (c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever or howsoever made, or any sounds, electronic impulses, or other data whatsoever;
>
> (d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),
>
> E
>
> or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purposes of expressing, describing or howsoever representing, that matter.

Lalu ditekankan oleh TPR terpelajar itu bahawa 'A photograph does not
F need negatives to qualify as a 'document' under the Evidence Act 1950. A negative of a photograph is, similarly, in itself a 'document' and each is independent of the other ... . And what about photographs taken using a polaroid camera; are they to be inadmissible for the simple fact that the negatives cannot be produced because there are no negatives? It is humbly submitted that the production of negatives is not the deciding factor for the
G production of the photographs as exhibit in court'. Mengenai isu ini, hakim terpelajar, di ms 836 rekod rayuan, menyatakan: 'It is true PW8 does not know the origin of the photographs, photographer or the negatives ... . However, in this case, PW7 ASP Takbir confirmed in his evidence that from his investigation, the photographer was unknown neither could it be ascertained when the photographs were taken. PW7 was not cross-
H examined on this aspect of his evidence ... . Further, PW12 Dato' Subramaniam confirmed the authenticity of two of the photographs where he was featured with accused though he could not recall the occasion. On the facts of this case, it is my view that the photographs P13A–E are properly admissible without the need to tender the negatives'. PW8 sendiri di dalam keterangannya (seperti yang dipetik di dalam penghujahan bertulis
I peguam terpelajar dalam Bahagian VI, di ms 6–23) mengatakan: '... I am not the photographer of these photographs. I do not know who the photographer is. These photographs were taken prior to my joining Maika

Holdings. I do not know if negatives are available ...'. Ketaralah berapa benarnya rumusan hakim terpelajar itu. Oleh demikian, mahkamah ini — puas hati dengan keputusan hakim terpelajar itu — khususnya jika diteliti daripada sudut perundangan penerimaan keterangan-keterangan sekunder.

Ditampilkan pula, oleh peguam terpelajar isu SP21 tidak memberi butir-butir agar kerja-kerjanya itu dapat diperiksabalas (counterchecked). Peguam terpelajar itu menegaskan: 'At many points in his evidence the only basis for a conclusions is either 'scientifically I can say that' or 'as an expert I can say that'. This, of course, means that the reasons for his conclusion are hidden from the court and cannot be scrutinized'. Hakim terpelajar, di ms 839–843 rekod rayuan menunjukkan bagaimana hujah peguam terpelajar perayu itu tidak bermerit. Muka surat-muka surat 205 dan sebagainya dan juga di ms 228 seterusnya dalam lampiran C menunjukkan laporan-laporan yang dibuat oleh SP21 dan ternyata di dalamnya bagaimana SP21 menjulangkan sebab munasabah dan rasional kepada konklusi-konklusi yang dibuat di dalam laporan-laporan itu. Dalam penghakiman hakim terpelajar di ms 839 rekod rayuan, hakim itu menyatakan: 'the characteristics of the ear was found by him to be the same'. Di ms 326 lampiran A pula, SP21, kepada soalan 'In terms of morphological observation which features you took into consideration?' menjawab 'Lower part of the auricular tubercle, lobule, end of lobule which is attached to the cheek. It is similar to the left and right ear'. Di ms 327 lampiran A, SP21 menyatakan: 'I observed in relation to the cheek. I found actor and male person in photograph the same'. Di ms 274 lampiran A, SP21 menyatakan: 'In this case, I found the oval shape of the external ear observed in the actor of the pornographic tape and the male person in the photograph and found they are the same'. Di ms 275 lampiran A, SP21 menyatakan: 'In this case the shape of the ear of the actor in the tape and the male person in the photograph do not have lobule ... . I found there were similarities in the ear of the actor and the male person in the photograph. I am sure of this. The positional relationship of the ear to the sideburns are also identical between the actor and the male person. Figure 15 explains this'. Semua ini adalah sebahagian daripada rasional yang diberi oleh SP21 mengenai telinga yang digunakan oleh SP21 sebagai salah satu daripada cara untuk mengenalpasti perayu di dalam gambar video. Malahan di ms 553, lampiran B, saksi perayu yang pertama menyatakan: '... Possible similarity in lower margin of the ear and thirdly, in shape of the ear'. Ini adalah jawapan kepada soalan 'In respect of figure 2.2 of your report you said you found three similarities in feature?'

Dalam perkara ukuran (measurements), ms 322 lampiran A menyingkap keterangan SP21 yang menyatakan: 'I do not have the working photographs from which the measurement made. I kept them in Japan. I measured it in accordance to figure 6. I found it to be square tapering ovoid shape. On my working photographs I blotted the same lines as the description in figure 6'. Tedaslah betapa 'working photos' itu tidak mencacatkan keterangan SP21. Muka surat-muka surat 323 dan 334 lampiran A menunjukkan bagaimana SP21 mendemonstrasikan penggunaan D6–A dan D6–B ('radius angular sheet and grid sheet'). Perlu

A diingat bahawa SP21 tidak diperiksabalas mengenai nilai-nilai ukuran bagi setiap satu ukuran yang SP21 buat. Muka surat-muka surat 346 dan 347 lampiran A mendedahkan bahawa SP21 menggunakan 'the best fit method' bagi rajah 19 dan 20 dan bukan method nilai ukuran'. Mengikut SP21 'Both the methods are accurate ...'. Di ms 350 lampiran A, SP21 menyatakan: 'The measurements are not necessary for me to determine the B positional relationship for my conclusion'.

Berkenaan 'cleft on chin', SP21 di ms 350 dan 351 lampiran A, menyatakan: 'My conclusion not affected by the presence or absence of cleft because so many other combined features are identical'.

Berpindah kepada keterangan SP21 mengenai hidung dan dahi, C keterangan saksi perayu di ms 553 lampiran B, nyata sekali, menyokong keterangan-keterangan SP21 itu. DW1, kepada soalan 'In respect of figure 2.2 of your report said you found three similarities in feature' menjawab: 'Yes, relative portrusion of nose ...'. Kepada soalan 'In respect of figure 2.3 you said the similarity of protrusion of nose and forehead has D similar profile?.' DW1 jawab 'Yes'.

Mengenai apa yang dikatakan oleh peguam terpelaiar bahawa 'at the end of the defence case the learned sessions court judge should have re-evaluated Dr Hashimoto's evidence in the light of the defence's expert evidence', TPR terpelajar menyatakan: 'The learned sessions court judge had rejected the evidence of the witnesses whom the defence tried to put E forth as experts. Hence, there was only the expert evidence of the prosecution experts (Assistant Professor Hashimoto and Abu Nasir Abu Hassan) which were before the learned sessions judge'. Di ms 853–866 rekod rayuan, hakim terpelajar telah dengan panjang lebarnya dan dengan secara terperinci, menganalisakan keterangan-keterangan saksi pakar perayu (DW1). Di ms 546 lampiran B pula, DW1 mengatakan: 'Yes, I do F not have qualification on forensic and physical anthropology. I do not have qualification on morphological study of human face.' Di ms 555 lampiran B itu, DW1 mengakui: 'I am not a physical anthropologist'. Di ms 558 lampiran yang sama, DW1, dalam menjawab soalan 'You are not qualified to express opinion of facial features of Indian?' menyatakan: 'It would be G true'. Di ms 581 pula, DW1 menegaskan: 'I have not done video superimposition method ever ... . I do not know Hashimoto's technics of superimposition'. Lantanglah DW1 tidak boleh dan tidak mampu membuat komen atas laporan SP21 itu. Seterusnya, di ms 537 dan 538 lampiran B, DW1 kata: 'I am concerned in planning for plastic surgery and I deal with living patient in respect of that work. I plan facial reconstructive H surgery by use of computer analysis and computer imaging. I do not do surgical work because I am not a surgeon ... . I developed method and sold the method to agency and hospital. Some of the system I sold are for facial recognition. I had sold to Dr Vannazis a scanner for the human face which allows one to produce three dimensional measurement and images on the face and it is used for identification of problems in connection with I comparing photographic and video material and also for the area in which Dr Hashimoto is an expert that of identifying human skull. The system could not be applied in this case because I did not scan the accused'.

Kepada soalan 'You need to have a live subject to pose for that system', DW1 jawab: 'Yes. It is not possible to do that as the accused had beard and heavy moustache ... . My system could be used by other countries where men do not have beard'. Di ms 540 lampiran B juga, DW1 menegaskan: 'I do not have a recognized qualification in physical anthropology'. Selanjutnya, DW1 dalam keterangan-keterangannya menyatakan bahawa beliau bukanlah seorang ahli mana-mana persatuan forensik internasional (International Forensic Association), Persatuan Antropologi Fizikal (Association of Physical Anthropology) atau Persatuan Internasional untuk Pengecaman (International Association for Identification). Di ms 573 lampiran B, DW1 berkata: 'I do not want to do the tracing again under these conditions because they could be seen and judged by others'. Dari keterangan-keterangan yang telah dihuraikan di atas mengenai DW1, ternyatalah bahawa DW1 tidak mampu dan tidak berupaya untuk mewujudkan suatu keraguan yang munasabah di dalam keterangan-keterangan SP21. Ini memperkukuhkan keputusan hakim mahkamah sesyen dan menyokong penghujahan TPR terpelajar mengenai kewajaran keterangan-keterangan DW1 diketepikan.

Dari sudut kelayakan kepakaran bagi mengenalpasti bahawa pelakon di dalam video itu adalah perayu, mahkamah sesyen telah, di ms 838–843, memperkatakan mengenai kelayakan SP21 saksi pakar pendakwa. Penghakiman hakim terpelajar ini disokong oleh keterangan-keterangan SP21 juga, khususnya yang terdapat di dalam lampiran A di ms 251–267, 303–307, 313, 316, 334, 344, 345, 351, 272, 273, 295, 298, 331 dan 350 dan di lampiran C di ms 205 dan seterusnya dan juga di ms 228 dan seterusnya. Kesemua keterangan-keterangan SP21 ini menunjukkan bagaimana SP21 menyatakan rasional yang membawanya kepada konklusi-konklusi yang dibuatnya itu.

Hakim terpelajar, di ms 843–847 rekod rayuan, menyentuh mengenai keterangan PW22 dan dalam hal ini keterangan DW5 di ms 750 lampiran B, telah menyatakan bahawa P12 'was not spliced'. DW5 menyatakan ini juga di ms 757 dan 765 lampiran B semasa beliau disoalbalas. Di ms 774 lampiran B, DW5 memberi keterangan mengenai bagaimana perbelanjaan adalah amat tinggi untuk membuat 'retouching'. Ini selaras juga dengan keterangan yang diberi oleh DW2 yang menggambarkan bagaimana mahalnya untuk melakukan 'superimposition'.

Berasaskan huraian-huraian di atas, mahkamah ini mendapati tiada sebab untuk mengganggugugat keputusan yang dibuat oleh hakim terpelajar mengenai keterangan-keterangan pakar atas pengecaman dan pengenalpastian pelakon di dalam video itu adalah perayu sendiri.

Mengenai penghujahan peguam terpelajar perayu atas perkara pihak pendakwa tidak memanggil Dr Prabhakaran sebagai saksinya, TPR terpelajar mengatakan bahawa hakim terpelajar dan SP21 tidak merujuk kepada pendapat Dr Prabhakaran. Dalam hal ini, SP21, di ms 267 lampiran A telah berkata: 'I know one Dr Prabhakaran. He is one of my students at University of Adelaide ... . Dr Prabhakaran is a lecturer in Kuala Lumpur. He is a forensic ordonthologist. On 8 January 1993, I was introduced to Supt Kew by Dr Prabhakaran. I spoke to him. He made requests to me to

A view a video tape'. Di ms 268 lampiran yang sama, SP21 kata: 'He wanted me to examine the video images on a video tape and a male person on the five photographs to ascertain whether it is the same person or not. I agreed to the request. I am familiar with the study that he wanted me to do ... . On 18 January 1993, I received a parcel through courier service. I received one PAL video tape, one album containing the photographs and Dr B Prabhakaran's report ... . I read Dr Prabhakaran's report after my examination. I did not use his report for my examination. I carried out my own examination. His conclusion is the same as mine'. Keterangan-keterangan ini tidak dipertikaikan oleh pihak perayu melalui pemeriksaan balas mereka. Justeru itu nyata sekali bahawa laporan Dr Prabhakaran tidak C ada apa-apa kepentingan untuk pihak pendakwa maka kerana itu mahkamah ini berpendapat bahawa kehadiran Dr Prabhakaran sebagai seorang saksi tidak membantu kes pendakwa dari sudut apa sekalipun. Adalah tidak wajar untuk dibangkitkan s 114(g) Akta Keterangan 1950 atas ketiadaan Dr Prabhakaran ini sebagai saksi pendakwa. Ini adalah kerana, tiada sebarang keterangan pun menunjukkan rujukan dibuat kepada D pendapat Dr Prabhakaran. Lagi pula, pihak pendakwa tidak langsung menyembunyikan saksi ini daripada pihak pembela. Oleh itu, mahkamah ini berpendapat bahawa hujah peguambela terpelajar atas isu ini tidaklah mempunyai merit.

Peguam terpelajar juga menarik perhatian mahkamah ini kepada penghakiman hakim terpelajar di ms 843 rekod rayuan dalam mana hakim E terpelajar itu telah menyatakan: 'Mr Karpal Singh who is known to the accused confirmed that the man looks like the accused so also the other police witnesses. Likewise PW8, PW12, PW15 and other police witnesses identified the person to look like the accused'. Dihujahkan oleh peguam terpelajar bahawa PW8 dan PW12 tidak pernah memberi keterangan F mengenai eks P12. Mereka hanya ditanya mengenai gambar-gambar MHB. Mereka tidak ditanya berkenaan dengan samada mereka melihat eks P12 atau tidak. Justeru itu dihujahkan oleh peguam terpelajar perayu bahawa hakim terpelajar telah 'completely misconceived their evidence'. TPR terpelajar bagaimanapun merujuk kepada keterangan SP11 (Karpal Singh) dan juga keterangan SP6 (Dato' Hj Mohd Zaman Khan, Pengarah Jabatan G Siasatan Jenayah, Bukit Aman). Mengikut SP6, pelakon di dalam video itu adalah perayu dan beliau berpendapat tidak perlu memanggil keterangan pakar. Pada pendapat mahkamah ini keterangan-keterangan saksi-saksi yang lain ini hendaklah diambilkira bersama-sama dengan keterangan-keterangan pakar yang telah dikemukakan oleh kedua-dua pihak dan mahkamah ini puas hati bahawa keterangan-keterangan itu menunjukkan H kepada suatu arah sahaja iaitu arah yang membuktikan tanpa sebarang keraguan munasabah bahawa pelakon dalam eks P12 itu adalah perayu.

Isu pencabaran DW4

Mengenai penghujahan peguam terpelajar perayu atas isu pencabaran I DW4, mahkamah ini berpendapat bahawa tindakan hakim terpelajar dalam prosiding pencabaran DW4 itu tidak patut digangguguat kerana segala apa yang dilakukan oleh hakim terpelajar itu adalah selaras dengan kehendak

undang-undang. Konklusi hakim terpelajar itu disokong oleh keterangan-keterangan yang ada. Mahkamah ini bersependapat dan bersetuju dengan rumusan-rumusan dan keputusan yang dibuat oleh hakim terpelajar. Rasional hakim terpelajar itu terpampang keutuhannya.

Pelbagai isu lain

Peguam terpelajar seterusnya membangkitkan beberapa isu lain dalam penghujahannya. Antara isu-isu itu yang mahkamah ini fikir wajar disentuhi ialah:

(a) perkara pihak pendakwa enggan memberi sesalinan eks P12;

(b) mahkamah sesyen tidak membenar perayu bersama-sama dengan peguamnya di meja peguam (bar table);

(c) penyiasatan dijalankan oleh pihak pendakwa semasa perbicaraan;

(d) mengumpul (collecting) keterangan di perkarangan mahkamah.

Mengenai perkara-perkara ini, TPR terpelajar menjawab dengan mengatakan bahawa peguam terpelajar tidak pula meminta mahkamah ini supaya mengenepikan sabitan kerana isu-isu itu. Penghujahan pihak perayu tidak juga memohon supaya keterangan-keterangan atau ekshibit-ekshibit yang telah diterima yang diasaskan atas perkara-perkara itu ditolak. Seterusnya TPR terpelajar menegaskan bahawa 'The truth of the matter is the so-called unsatisfactory features cannot affect the trial in any way. No authority is presented in support of them of their intended effect.'

Mengenai isu di perenggan 14(b) TPR terpelajar menyatakan: 'The appellant and his counsel were constantly in communication during the course of the trial'. Mengenai perkara-perkara di dalam perenggan-perenggan 14(c) dan (d), TPR terpelajar menyatakan bahawa 'There is nothing in law which prohibits the gathering of evidence during the course of a trial'.

Setelah ditimbangkan penghujahan kedua-dua pihak, mahkamah ini berpendapat bahawa dalam perkara di perenggan 14(a), pihak perayu boleh memohon penangguhan bagi membolehkan meneliti eks P12 itu. Malangnya, tidak terdapat di dalam rekod sebarang catitan yang menunjukkan pihak perayu telah membuat demikian. Mahkamah ini juga bersetuju mengenai perkara di perenggan 14(b) bahawa keengganan mahkamah sesyen itu tidak memprejudiskan perayu sama sekali kerana tidak ada apa-apa di dalam rekod rayuan yang menunjukkan bahawa perayu telah dihalang daripada berhubung dan memberi arahan-arahan kepada peguamnya. Mengenai perkara-perkara dalam perenggan 14(c) dan (d) itu, mahkamah ini bersetuju dan bersependapat dengan hujah yang diberi oleh TPR terpelajar dan mendapati bahawa perkara-perkara yang dibangkitkan itu tidak samasekali memprejudiskan perayu dalam apa bentuk sekalipun.

Peguam terpelajar juga menarik perhatian mahkamah ini kepada ms 883–884, 848–850 rekod rayuan dalam mana hakim terpelajar telah membuat beberapa rujukan-rujukan kepada keterangan-keterangan berkaitan dengan apa yang dikatakan oleh Ravindran kepada peguamnya

A iaitu SP13. Tegas peguam terpelajar bahawa 'the whole of the evidence of PW13 involving communications with Ravindran should be excluded'. Mengenai isu ini, TPR terpelajar menyatakan bahawa apa yang dikatakan oleh Ravindran kepada PW13 itu adalah relevan kerana ianya menjelaskan kelakuan (conduct) SP13 berkaitan dengan perintah persetujuan. Mengikut TPR terpelajar itu lagi: 'Respondent's statement explains why PW13 acted B contrary to his first instruction from Ravindran. In case the court holds sessions judge is wrong on point of Ravindran's statement, it should not affect the conviction in any way'.

Dengan penghujahan ini, mahkamah ini bersetuju. Peguam terpelajar juga menarik perhatian mahkamah ini kepada notis yang dikeluarkan di C bawah s 51 KAJ dan seterusnya mengatakan: 'But we are saying the notice mentioned in s 65(1)(a)(i) is in s 66. Prosecution failed to prove notice under s 66 therefore s 65(i)(a)(i) is inapplicable'. Bagi menjawab hujah ini, TPR terpelajar mengatakan bahawa notis di bawah s 51 KAJ adalah 'such notice to produce it as is prescribed by law' seperti yang disebut di dalam s 66 Akta Keterangan 1950. Mahkamah ini bersetuju dengan hujah TPR D terpelajar itu.

Mengenai penghujahan peguam terpelajar yang menekankan bahawa hakim terpelajar telah menggunakan perkataan 'unrealistic' semasa membincang berkenaan dengan versi yang dikemukakan oleh saksi perayu keempat (DW4) berkenaan dengan pita Rama, wajar juga diingat bahawa E peguam terpelajar itu menegaskan betapa penggunaan perkataan 'unrealistic' itu membuktikan hakim terpelajar telah menggunakan atau mengenakan beban bukti yang tinggi kepada pihak perayu. Menjawab hujah ini, TPR terpelajar menarik perhatian mahkamah ini kepada ketiadaan pemeriksaan balas atas saksi-saksi pendakwa mengenai pita yang menyahut gambaran seperti 'pita Rama'. Ditekankan oleh TPR terpelajar F itu bahawa saksi perayu keempat memulakan tindakan terhadap Ravindran tanpa sebarang bukti dengannya. Dan apabila saksi itu memperolehi 'pita Rama' itu, dia memberi balik kepada Rama. Kemudiannya saksi itu kata Rama hilang apabila ia cuba mendapatkan semula 'pita Rama' itu. Lantas TPR terpelajar itu kata: 'The counduct of Murthi (DW4) in relation to this G so-called Rama tape is inconsistent with the ... of a prudent advocate and solicitor, whose duty it is to act for his client without fear or favour'. Mahkamah ini bersetuju dengan hujah ini dan mahkamah ini juga berpendapat bahawa ms 874–879 rekod rayuan menunjukkan keputusan dan rasional hakim terpelajar itu adalan tidak patut tidak direstui.

Kedua-dua pihak juga menyentuh mengenai kenyataan hakim H terpelajar di ms 843 rekod rayuan yang berbunyi 'I have seen P(12) on a number of occasions in the course of the trial and also satisfied in that accused is the male person on P(12)'. Dalam hal ini, mahkamah ini juga berpeluang melihat P12 itu dan mahkamah ini puas hati bahawa apa yang dikatakan oleh hakim terpelajar itu tidaklah boleh dikatakan salah. Malahan keterangan lain dan keterangan-keterangan pakar khususnya menyakinkan I bahawa keputusan hakim terpelajar yang P12 menunjukkan perayu adalah betul. Mahkamah ini puas hati bahawa keterangan-keterangan menunjukkan tanpa sebarang keraguan munasabah bahawa perayulah pelakon lelaki dalam P12 itu.

Perkara eks IDD37 juga diperhujahkan oleh kedua-dua pihak. Setelah diteliti penghujahan-penghujahan itu mahkamah ini puas hati bahawa tindakan hakim terpelajar itu tidak patut disalahkan dengan terpaparnya pada mata kasar perbezaan-perbezaan yang wujud mengenai tandatangan Ravindran di eks P7, eks DPVI (P20 lampiran C) dan IDD37. Jika pun IDD37 diterima sebagai ekshibit, nilai keterangan ini tidak dapat menolong mengubahkan sabitan atas perayu. Lagi pula, keterangan SP11 yang merujuk kepada beberapa akhbar-akhbar dan guaman sivil oleh perayu menunjukkan wujudnya skandal pita-pita lucah yang melibatkan perayu. Oleh demikian, penghujahan TPR terpelajar bahawa perintah persetujuan dan IDD37 itu adalah suatu tipuhelah (hoax) perayu untuk membersihkan dirinya dari penglibatan dengan pita-pita skandal itu, adalah sesuatu yang munasabah dan yang menampilkan suatu versi yang semulajadinya berkemungkinan (inherently probable). Sekaligus versi ini tidak biasa mampu menimbulkan sebarang keraguan munasabah dalam kes pendakwa — apatah lagi dengan adanya keterengan yang menunjukkan IDD37 dan DPVI tidak bertarikh.

Berakhir dengan isu beban bukti di dalam kes ini, mahkamah ini puas hati bahawa hakim terpelajar mempunyai keterangan-keterangan yang cukup, semasa pendakwa menutupkan kesnya, untuk menthabitkan perayu jika beliau pilih untuk berdiam diri. Mahkamah ini juga puas hati bahawa hakim terpelajar telah mengambil kira semua keterangan-keterangan yang dikemukakan oleh kedua-dua pihak. Setelah itu, hakim terpelajar itu mendapati bahawa pembelaan perayu telah gagal menimbulkan sebarang keraguan dalam kes pendakwa. Hakim terpelajar itu juga memutuskan bahawa pihak pendakwa telah membuktikan kesnya tanpa sebarang keraguan munasabah. Mahkamah ini yakini keputusan (sabitan dan hukuman (sentence)) hakim terpelajar itu adalah tepat, betul dan sejajar dengan kehendak undang-undang, statut dan kes.

Berasaskan penghuraian-penghuraian dalam perenggan-perenggan sebelum ini, mahkamah ini meredhakan rayuan perayu ini ditolak.

Court of Appeal

24 August 1998

Gopal Sri Ram JCA (delivering the judgment of the court): The appellant was convicted by the sessions court at Ipoh of an offence under s 193 of the Penal Code (FMS Cap 45) and sentenced to a term of imprisonment of one month and a fine of RM2000 or in default a term of imprisonment of two weeks. His appeal to the High Court against conviction and sentence was dismissed. He then appealed to this court. At the conclusion of arguments, we allowed the appeal. The reasons for our decision now follow.

The prosecution's case against the appellant is that he fabricated false evidence, the sting of the charge being that he affirmed an affidavit that contained false statements which was filed in a suit he instituted in the Ipoh High Court. The portions complained of read as follows:

A During the period the defendant by the use of a hidden video camera secretly videotaped me in embarrassing situations without my knowledge and has spliced in video images from pornographic tapes to create a composite image.

By the said publication I have been made out to as a person who has acted in pornographic tapes.

B It may, for completeness, be mentioned here that an alternative charge under s 199 of the Penal Code was also preferred against the appellant. At the close of the whole case, the sessions court found both the principal and alternative charges proved. It then convicted the appellant upon the principal charge.

C In support of its case against the appellant, the prosecution produced in evidence a video tape ('exh P12') which depicted the appellant committing acts of sexual intercourse with a female partner. Evidence, including that of an expert, was led by the prosecution to show that the images of the male appearing in exh P12 were indeed that of the appellant. The sessions court found as a fact that the male actor in exh P12 was the appellant. That D conclusion was arrived at after a careful analysis of the material placed before it. Being clearly a finding of fact based upon irrefragable evidence, it was affirmed by the High Court on appeal. It is the settled practice of this court not to interfere with concurrent findings of fact save in very rare cases. If, for instance, it could be shown that the course of events affirmed by the trial judge could not have occurred, that would be a good reason for E reversing his view. See *The Eurymedon* (1942) 73 Lloyd LR 217; *Tara Singh & Ors v PP* [1949] MLJ 88 and *Tengku Mahmood v PP* [1974] 1 MLJ 110. So too may appellate interference be warranted where the trial judge has failed to critically assess and analyse the prosecution's evidence. See *Syed Abu Bakar bin Ahmad v PP* [1984] 2 MLJ 19.

F However, the present instance is not one which falls into any of the recognized categories of cases where this court may interfere with concurrent findings of fact. We are therefore not disposed to accede to so much of the appeal as is directed against the finding by the sessions court that the appellant is the actor in exh P12. Indeed we are satisfied that the particular finding of fact by the sessions court was amply justified by the G evidence.

Although a number of other grounds were advanced before the High Court and reventilated before us, we find it sufficient to dispose of this appeal upon a point that forms the fulcrum of the case against the appellant but which does not appear to have been sufficiently appreciated by the courts below. Although we choose not to deal with the other arguments, we H are not to be taken as affirming the views expressed upon these by the courts below.

It is true that the appellant stated on oath that he had 'been made out to as a person who has acted in pornographic tapes'. It is equally true that the prosecution had established beyond a reasonable doubt that the male I actor appearing in exh P12 is indeed the appellant. But what appears to have been missed is the absence of any cogent link between the declaration

made by the appellant and exh P12. In other words, the prosecution failed entirely to establish beyond a reasonable doubt that the appellant was referring to exh P12 in the material paragraphs of his affidavit which formed the basis of the charge. He may well have been. But it is an equally reasonable inference that he was referring to some video tape other than exh P12. And the latter inference is supported by evidence adduced in the course of the prosecution's case. It is axiomatic that in a criminal case where two inferences may reasonably be drawn from the same set of facts, the inference most favourable to the accused should be adopted. See *Tai Chai Keh v PP* [1948–49] MLJ (Supp) 105 at p 108; *PP v Kasmin bin Soeb* [1974] 1 MLJ 230.

The 10th edition of Sir Hari Singh Gour's work on the Indian Penal Code at p 1651 of Vol 2, contains the following commentary on s 193 which we accept as a correct statement of the law:

> It is incumbent on the prosecution to show that the statement made by the accused was false. It must prove that it is not probably but necessarily false and that he knew it to be so. A statement might be inaccurate ambiguous dubious or uncertain. But it is not on that account necessarily false. The fact that the statement as suggested a wrong inference may suffice to make it false, but it cannot then be held to be intentionally false.

Accordingly, on the facts of the present case it was incumbent for the prosecution to prove beyond a reasonable doubt either:

(1) that exh P12 was the very tape which the appellant spoke of in his affidavit; or

(2) that the only tape in existence is exh P12, so that the appellant could not possibly be referring to any other tape.

Neither was established in accordance with the standard required by adjectival criminal law. There was, therefore, no proof of falsity which is an essential ingredient of an offence under s 193 of the Penal Code.

Accordingly, the sessions court should have held that the prosecution had not proved the charges at the close of its case. The defence ought not therefore to have been called.

There is one other matter of importance to which we must make reference. When the appellant was called upon to make his defence, he called his solicitor, En MS Murthi, to give evidence on his behalf. During the course of his evidence under cross-examination, the prosecution successfully applied to impeach the credit of this witness by reference to alleged contradictions between his evidence in court and the previous statement he had made to the police in the course of their investigations. Having carefully scrutinized the whole of the evidence given by the solicitor, including his explanation as well as the evidence of the recording officer, we are more than satisfied that there were absent any grounds for impeachment. Sessions judges and magistrates should always bear in mind that the impeachment procedure is cumbersome and slow and should not

A be used unless the apparent discrepancy is material to the issue. See *Muthusamy v PP* [1948] MLJ 57.

The sessions court in the present case was clearly wrong in holding that the solicitor was a witness without credit especially in the light of the recording officer's admission of a possibility of confusion on that portion of the previous statement contended by the prosecution to amount to a B material contradiction. We are therefore constrained to hold that the solicitor's evidence did not lack credit and that the impeachment proceedings ought not to have been permitted in the circumstances of the present case.

For the foregoing reasons, we allowed the appeal. The appellant's C conviction was quashed. The sentence imposed upon him was set aside. The fine, if paid, was ordered to be refunded.

Appeal allowed. Appellant's conviction quashed and sentence set aside.

Reported by David Lai

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